1999

Rae Lyn Schwartz v. David Benzow : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RAE LYN SCHWARTZ,	)	
	)	
Plaintiff/Appellant,	)	Case No. 990328
	)	
vs.	)	
	)	Priority #15
DAVID BENZOW,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM A FINAL JUDGMENT AND ORDER
HONORABLE ROBERT T. BRAITHWAITE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

BRIEF OF APPELLEE

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JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78-2a-3(j). Jurisdiction in the Supreme Court prior to transfer was proper pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly rule that Schwartz is not entitled to a new trial based upon the jury verdict, because the verdict is not irreconcilably inconsistent and Schwartz failed to object timely?

Standard of review: The district court's denial of Schwartz's motion for a new trial is reviewed for abuse of discretion. Crookston v. Fire Insurance Exch., 860 P.2d 937, 938 (Utah 1993).

Preservation in record below: Schwartz did not preserve a timely objection to the jury's special verdict. Any objection to allegedly inconsistent jury findings must be presented prior to discharge of the jury; waiting to file a motion for new trial is not sufficient. Ute-Cal Land Development Corp., 605 P.2d 1240, 1247 (Utah 1980).

2. Was the district court within its discretion in permitting Officer Bigler's testimony as to the statements of Erica Wolfe and Carolyn and, if not, was the error harmless?

Standard of review: The district court's decision to allow the testimony is reviewed for abuse of discretion. Layton City v. Peronek, 803 P.2d 1294, 1296 (Utah App. 1990).

Preservation in record below: This issue was raised below at trial. (T. 192-98, 251-52).

3. Was the district court within its discretion in declining Schwartz's untimely request for a jury instruction on passing zones and, if not, was the error harmless?

Standard of review: A trial court's refusal to give a jury instruction untimely requested during trial may be overturned only upon abuse of discretion. State v. Evans, 668 P.2d 566, 568 (Utah 1983).

Preservation in record below: Schwartz's request for a jury instruction on passing zones was made, and responded to by Benzow, during the trial. (T. 308-13).

STATUTES AND RULES

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

* * *

(2) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

This is a negligence action arising out of an accident which occurred on June 4, 1995. Rae Lyn Schwartz filed a personal injury suit on July 2, 1997 (R. 2), and the case was tried to a jury on November 18-19, 1998 (T. 1-377). The jury returned a verdict finding both parties 50 percent at fault, which resulted in a judgment for the defendant entered on January 13, 1999. (R. 264, 270).

Schwartz filed a motion for new trial on January 25, 1999 (R. 273), which was denied in an order entered March 11, 1999. (R. 297). Schwartz filed a notice of appeal on April 9, 1999. (R. 300).

Statement of Facts

On June 4, 1995, 17-year-old Rae Lyn Schwartz and a group of other bicyclists from New Jersey were shuttled to the top of a pass on State Road 14 in Iron County, Utah. (T. 56). The group had not been on this particular road before. (T. 85).

Rae Lyn Schwartz "didn't bike a lot." (T. 102). Her bicycle was a mountain bike, but with road tires on it. (T. 106). On the day of the accident, the road was "really wet." (T. 108). The group retrieved their bicycles and helmets from the back of the truck, and starting pedaling west toward Cedar City, with a woman named Wendy in the lead, and Schwartz in the middle. (T.59). For the next 10-15 minutes, the bicyclists traveled at about 20-30 miles per hour, during which time they were passed by approximately five vehicles. (T. 60-61, 77, 121).

This same Sunday morning, 53-year-old David Benzow and his wife Janice Benzow left their summer residence at Duck Lake to attend church in Cedar City. (T. 205-07). Driving a yellow CJ-5 jeep with a black top, the Benzows traveled a few miles up a dirt road to the intersection of State Road 14. (T. 206-08). As they proceeded toward Cedar City on SR 14, they observed some bicyclists up ahead of them on the highway. (T. 208, 233-34). At this location, SR 14 is divided by a double yellow line. (T.39).

As Benzow approached, Schwartz was in her highest gear, and was "riding" her brakes "to maintain a reasonable speed," but said she was still travelling at about 25 miles per hour. (T. 116, 150-51, 155). Schwartz was unsure, but estimated the bicyclists' speed as "in the neighborhood of 30 miles an hour." (T. 222).

Schwartz and another bicyclist testified that they were about "two feet or so" inside the "fog" (shoulder) line. (T. 62, 67, 89, 113). Benzow testified, however, that although the first two bicyclists he encountered were "near the right side of the road," the lead rider and at least one other rider were within a foot of the center line. (T. 212-13). Benzow and his wife testified that two of the riders (which would have included Schwartz) were either side by side, or otherwise very close together. (T. 221, 234).

Benzow slowed down as he approached the bicyclists. (T. 220). After honking his horn to alert them to his presence, Benzow drove past the first two riders without difficulty. (T. 213-14). The lead bicyclist, however, was close to the center line, and Benzow could not get past. (T. 215). Accordingly, Benzow said, "I slowed down, because the road is blocked, and I honked my horn several more times, hoping that

person would pull over." (T. 215). The bicyclist remained near the center of the road for another 10-15 seconds, and then finally pulled over to the right so that Benzow could get by. (T. 215).

While the Benzows were waiting for the lead bicyclist to move over, Schwartz apparently became concerned about the jeep "hovering" beside her for the 10-15 seconds. Schwartz claimed that Benzow started edging closer to her, and then struck the handlebars of her bicycle with his vehicle, causing her to crash. (T. 117).

David and Janice Benzow testified that they never got closer to Schwartz than two or three feet. (T. 226). Schwartz's principal witness, Jeffery Branigan, testified that he saw Schwartz's handlebars turn around, but did not see the jeep strike them. (T. 96). When Schwartz went down, the bicyclist behind her, Erica Wolfe, crashed into Schwartz' bicycle and was also injured. (T. 75-76).

Benzow stated that, as he was driving past the bicyclists, he crossed over or "straddled" the double yellow line in the center of the highway. (T. 222-24). Benzow acknowledged that he would not cross a double yellow line to pass a car or motorcycle, but said that he would to pass a bicycle. (T. 225). Benzow admitted that Officer Bigler later told him bicycles have the same rights as vehicles on the highway. (T. 225, 280).

Benzow proceeded to Cedar City, with no indication that anything was amiss. (T. 216). At about 1:00 p.m. that afternoon, Trooper Bigler stopped Benzow to ask about the accident. Bigler testified that Mr. Benzow "was completely surprised when I told him of the two bicycles that had crashed." (T. 261).

Bigler looked for any scuff or scrape marks on Benzow's vehicle, which was still covered in dust from travelling up the dirt road earlier in the day. ("Black top with Armor-All on it kind of attracts dust like a magnet."). (T. 218-19, 260). He found no evidence that the jeep had recently come into contact with another object. (T. 260).

The matter was submitted to the jury on an agreed verdict form (T. 298), and the jury returned the following special verdict:

> Please answer questions 1 through 6 from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.
>
> 1. Considering all of the evidence in this case, do you find from a preponderance of the evidence that defendant David Benzow was negligent?
>
> ANSWER: Yes _____ No __X__
>
> 2. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the negligence of the defendant David Benzow was either the sole proximate cause or a contributing proximate cause of plaintiff's injuries?
>
> ANSWER: Yes __X__ No _____
>
> 3. Considering all of the evidence in this case, do you find from a preponderance of the evidence that plaintiff was negligent?
>
> ANSWER: Yes _____ No __X__
>
> 4. Considering all of the evidence in this case, do you find from a preponderance of the evidence that the negligence of plaintiff Rae Lyn Schwartz was either the sole proximate cause or a contributing proximate cause of plaintiff's injuries?

ANSWER: Yes __X__ No _____

5. If you have answered "Yes" to either or both Questions 2 and/or 4 then, and only then, answer the following question:

Assuming the combined negligence of the parties to total 100%, what percentage of that negligence is attributable to:

A.	David Benzow	__50__ %
B.	Rae Lynn Schwartz	__50__ %

6. If you have answered "Yes" to Question 2 and you have attributed to defendant David Benzow more than 50% of the total negligence, then and only then, state the amount of damages, if any, sustained by plaintiff as a proximate result of plaintiff's injuries. If Question 2 was answered "No," or if you have attributed to defendant David Benzow 50% or less of the total negligence, then do not answer this question.

A.	Past Medical Expenses	$_____
B.	Future Medical Expenses	$_____
C.	General Damages (pain and suffering, etc.)	$_____
	TOTAL:	$_____

(R.264). The Special Verdict answers were read aloud verbatim by the clerk. (T.372-75). The jury was polled, after which the trial court asked, "Anything else to come before the Court at this time?" (T.376). No objection was raised.

On December 11, 1998, Schwartz filed an Objection to Judgment on Jury Verdict, the sole grounds for which was the inclusion of costs prior to submission of a memorandum by Benzow. (R.268). The trial court eliminated that language, and entered a Judgment on Jury Verdict on January 13, 1999. (R.270). On January 25, 1999, Schwartz filed a Motion for New Trial raising, for the first time, an objection to the jury's Special Verdict. (R.273).

SUMMARY OF ARGUMENT

Schwartz's arguments regarding alleged inconsistencies in the special verdict fail for two separate reasons. First, Schwartz waived any entitlement to challenge the verdict by failing to object prior to discharge of the jury. The Utah Supreme Court has consistently held that a contemporaneous objection is required to preserve appellate grounds, because the jury who heard the case should be given an opportunity to clarify any ambiguities in its findings.

In any event, the answers to the special verdict interrogatories are not irreconcilably inconsistent. The jury's intent – that Schwartz not recover against Benzow – was clear, as evidenced by its allocation of 50 percent fault to each of the parties and leaving blank the damages line. The jury had been expressly instructed that attributing 50 percent fault or more to Schwartz would mean no recovery to her, and the overall verdict plainly reflects an intent to reach that result. Any ambiguity in the other questions should be disregarded as surplusage which does not override the jury's dispositive findings.

The district court's decision to allow Officer Bigler to testify as to the statements of Erica Wolfe and Carolyn was not an abuse of discretion. It was undispuated that Troop Bigler took the statements as part of his official duties, and incorporated them in a report prepared pursuant to those duties. Accordingly, the evidence was admissible under the public report exception, U.R.E. 803(8). Additionally, the evidence was admissible under U.R.E. 803(1) as a present sense impression. When Erica Wolfe made her statement to Officer Bigler, she was still lying on the ground at the accident scene.

Carolyn's statement was made shortly thereafter, at the hospital. Both statements qualified for admission under subsection 1.

Finally, the district court did not abuse its discretion in refusing to give Schwartz's proposed jury instruction no. 22. The instruction was untimely under a previously entered scheduling order, would have required additional clarification to the jury, and was essentially covered in other instructions.

ARGUMENT

I. SCHWARTZ IS NOT ENTITLED TO A NEW TRIAL BASED UPON THE JURY'S VERDICT.

A. Schwartz waived any right to seek relief from the jury verdict by failing to object prior to discharge of the jury.

Schwartz's principal argument on appeal is that the district court should have granted a new trial based upon what Schwartz characterizes as "the incomprehensible jury verdict." Although the verdict form when viewed in its entirety would not support a new trial in any event, this Court should not even reach the issue because Schwartz waived it in the court below.

The special verdict form submitted to the jury was substantially identical to MUJI Form 36.1, particularly with regard to questions 1 through 5. Schwartz did not object to the form. (T.298).

The jury's answers to the special verdict interrogatories were read aloud by the clerk in the presence of counsel. The inconsistencies alleged on appeal were, according to Schwartz, "glaring," "blatant," "obvious," and "readily apparent." (Brief of Appellant

at 4, 6, 9). Nonetheless, counsel made no effort to address his concerns with the appropriate person – the trial judge – at the appropriate time – before the jury had been discharged.

Schwartz concedes that "[n]ormally, a party is not permitted to move for a new trial on grounds that the verdict was defective, if it fails to take appropriate action before discharge of the jury." (Brief of Appellant at 10). Indeed, the proscription is quite unambigous: "It is the rule in Utah that a failure to object to a verdict, informal or insufficient on its face, before the jury is discharged, constitutes a waiver of that objection." Ute-Cal Land Development Corp., 605 P.2d 1240, 1247 (Utah 1980).

The rationale behind the rule is, of course, that any clarifications needed can be made by the jury while it is still impaneled. "The proper procedure when an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation . . . . It is well established by numerous authorities that when a verdict is not in the proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected." Id., quoting Cohn v. J. C. Penney Co., Inc., 537 P.2d 306, 311 (1975).

Schwartz offers no reason for failing to object at the time the verdict was announced, other than a suggestion that no objection was necessary because the alleged error was patent, and "counsel for Schwartz was not provided a copy of the completed jury form until after the jury was discharged." (Brief of Appellant at 10). A similar argument was made – and soundly rejected – in Martineau v. Anderson, 636 P.2d 1039

(Utah 1981), in which a jury awarded special damages to the plaintiff but no general damages. After being sent back to rectify the discrepancy, the jury returned with a verdict in the same amount, this time awarding all general damages and no special damages. The jury was excused, after which the plaintiff objected to the verdict. The trial court denied the plaintiff's motion for a new trial, and an appeal followed.

On appeal, the plaintiff argued that the verdict on its face, including some additional language which had not been read by the clerk, clearly showed an improper verdict warranting a new trial. As in this case, counsel complained that he had not been given a copy of the verdict form until after the jury was excused. After considering whether the jury's answers could be reconciled, the Supreme Court cut to the chase:

> Notwithstanding all of the foregoing, the record is clear that at no time prior to the release of the jury, did either counsel object to the verdict or even request to see it. Plaintiff specifically contends on appeal that the court failed to give counsel an opportunity to examine the verdict before it was resubmitted to the jury and before the jury was dismissed. Plaintiff acknowledges that unless timely objected to at trial, any irregularity appearing on the face of the jury verdict is waived. Plaintiff asserts, however, that the trial court has the burden of providing counsel with an opportunity to examine the verdict, and that by failing to provide the verdict to counsel the court has denied counsel the opportunity to object. Such is not the law. Clearly, counsel has the obligation not only to object to the form of the verdict, but to affirmatively seek to examine it.

636 P.2d at 1043.

The court concluded that, "by failing to request court permission to examine the verdict, plaintiff has waived any objection to the form of the verdict." Id. The same result is even more appropriate in this case, where there is no suggestion that any part of the jury's verdict was omitted during the clerk's reading. The answers were read plainly

and clearly, and could easily be tracked with a blank special verdict form or piece of paper. (T.373-75).

Schwartz cites Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078 (Utah 1985) for the proposition that no waiver occurred. Bennion does indeed note an exception to the waiver rule "when a verdict is so ambiguous, contradictory or illogical that it does not clearly indicate for whom the verdict is rendered, and the verdict would leave the Court in the position of having no alternative but to guess at what the jury intended." Id. at 1083. No such situation exists here. It is quite clear what the jury intended: No recovery for Schwartz, because she was equally to blame for causing the accident – hence the "no" answers on negligence, the 50/50 allocation of fault, and the blank damages line. The other two answers may be a bit unusual, but the overall intent is quite plain.

"The rule requiring an objection if there is some ambiguity serves the objective of avoiding the expense and additional time for a new trial by having the jury which heard the facts clarify the ambiguity while it is able to do so," the Supreme Court wrote in Bennion. Just as the court ultimately held in that case, failure to object to the special verdict precludes a belated challenge on appeal.

B. The verdict is not irreconcilably inconsistent in any event.

Appellee acknowledges that the jury's negative responses to questions 1 and 3 and its affirmative responses to questions 2 and 4 might appear inconsistent. However, those responses must be examined in light of the jury's response to question 5, in which the jury allocated any negligence of the parties equally between them.

In the trial court's instruction number 11, the jury was expressly informed as to the consequences of attributing fifty percent or more of the negligence to plaintiff, namely that she would recover nothing:

> No. 11: If you find that the defendant was negligent, you must decide if the plaintiff was also negligent. If the plaintiff was negligent and the plaintiff's negligence was a proximate cause of the plaintiff's own injuries, the plaintiff's negligence must be compared to the negligence of the defendant.
>
> A plaintiff whose negligence is less than 50 percent of the total negligence causing the plaintiff's injuries may still recover compensation, but the amount will be reduced by the percentage of the plaintiff's negligence. If the plaintiff's negligence is equal to or greater than the negligence is equal to or greater than the negligence of the defendant, then the plaintiff may recover nothing.
>
> For example, if you find the plaintiff's negligence was 30 percent of all negligence causing the injuries, then the plaintiff's recovery will be reduced by 30 percent. On the other hand, if you find the plaintiff's negligence is 50 percent or greater, then the plaintiff will recover nothing.

(T.321-22; emphasis added). See also Instruction No. 32 (T.332).

The jury's negative response to question 1, when read with its allocation of fifty percent of any negligence to Schwartz, clearly indicates the jury's intent to find that Schwartz was not entitled to recover any damages from Benzow. Consistent with that intent, the jury left the damages line blank. The jury's other answers may best be viewed as surplusage, which do not affect the dispositive findings. E.g., Turpie v. Southwest Cardiology Associates, 124 N.M. 787, 955 P.2d 716, 720 (App. 1998) (jury finding of causation as to wife's derivative injuries and award of damages to wife properly disregarded as surplusage in light of finding of no causation as to husband's death), Nania v. Pacific Northwest Bell Telephone Co., Inc., 60 Wash. App. 706, 806 P.2d 787 (1991) (jury answers allocating contributing negligence to three defendants was

surplusage, where ultimate finding of proximate cause was dispositive); Lonardo v. Litvak Meat Co., 676 P.2d 1229, 1231-32 (Colo. App. 1983) (inconsistent jury findings on causation and damages were "irrelevant" and "harmless" because "jury's intention that plaintiffs not recover any damages was clear" from allocation of 50 percent fault to each party).

Schwartz acknowledges that "[a] jury's answers to special interrogatories must be read harmoniously." (Brief of Appellant at 10). Appellee agrees. The jury's intent was clear, and there is no cause for a new trial.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING OFFICER BIGLER'S TESTIMONY REGARDING THE STATEMENTS OF ERICA WOLFE AND CAROLYN, AND ANY CLAIMED ERROR WAS HARMLESS IN ANY EVENT.

Trooper Jeffrey Bigler has been with the Highway Patrol for more than 16 years, and has been stationed in the Cedar City area since 1987. (T. 237-38). During his tenure with the Highway Patrol, Bigler has received extensive training in motor vehicle accident investigation, including basic, intermediate, and advanced investigation courses, and has investigated thousands of accidents. (T. 238-39). Bigler's job duties include determining the cause of accidents, and completing accident reports indicating primary and contributing causes. (T. 263).

As part of his duties, Bigler normally interviews persons involved in an accident, and did so in this case. (T. 249). Bigler was dispatched directly to the accident site, where he saw the damaged bicycles and two injured women lying on the side of the road. (T. 247-49, 261). Bigler interviewed both of the victims, Rae Lyn Schwartz and Erica

Wolfe, and other persons who were present. (T. 249-51). He subsequently prepared a report, which was duly filed with the Highway Patrol. (T. 240-41).

During trial, counsel for Schwartz objected to testimony from Bigler pertaining to statements he had gathered from Wolfe and another bicyclist, "Carolyn," arguing that the evidence constituted inadmissible hearsay. (T. 192-98).[1] Schwartz apparently was concerned that Erica and Carolyn's statements contradicted her account of the accident.[2]

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[1] The entire testimony regarding Erica's statement was as follows:

"She told me that when her and Rae Lyn had crashed on their bikes, that Rae Lyn had went down first, and that Erica had crashed into Rae Lyn. Erica told me that she was riding approximately 12 feet behind and approximately 1 foot to the right of Rae Lyn. Erica said that Rae Lyn was riding in the center of the lane, and Erica was more towards the shoulder. . . . Erica also said she doesn't remember a jeep coming by Rae Lyn. Just that Rae Lyn had went down on the road and that Erica had ran into Rae Lyn." (T. 252-53).

The testimony regarding Carolyn's statement consisted of the following:

"Carolyn told me that she doesn't remember a jeep hitting Rae Lyn. She said that when the jeep passed, it did pass close to the group. Carolyn said that the jeep was approximately 15 feet ahead of Rae Lyn when Rae Lyn went down, and Carolyn was on a bike approximately 20 feet behind Erica when Rae Lyn went down." (T. 253-54).

[2] Ironically, testimony elicited by Schwartz' own counsel would have provided the jury with the same inference. For example, counsel asked Bigler:

Q. Did you have any reason to doubt Rae Lyn Schwartz when she told you that she had been hit by a jeep?

A. Initially no.

Q. Initially. You did later?

A. After I had talked to everybody. (T. 279).

The district court did not abuse its discretion in permitting the testimony. Bigler's testimony was admissible under at least two exceptions to the hearsay rule.[3] Utah Rule of Evidence 803(8) provides for the admission of

> records, reports, statements, or date compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there is a duty to report . . . or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

"The public records and reports exception to the hearsay rule (Rule 803(8)) is premised on the idea that 'public employees presumably are diligent in gathering and recording information for their employer, the government.' *Edward J. Imwinkelried, Evidentiary Foundations 291 (3d ed. 1995).* Under usual circumstances, 'since the assurances of accuracy are usually even greater for public records than for regular business records, the proponent is not required to establish their admissibility through foundation testimony.' *5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence @ 803.13[1] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997).*" J. S. v. State, 939 P.2d 196, 201 n.3 (Utah App. 1997).

In J. S., the appellant challenged the admission of a caseworker's report which consisted entirely of statements by other individuals. "The caseworker testified that she

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[3] Schwartz notes that the trial court did not complete its statement when overruling her objection to the evidence. The trial court's statements do not control the admissibility of evidence. See, e.g., J. S. v. State, 939 P.2d 196, 200 n.2 (Utah App. 1997) ("It is appropriate to uphold the admission of the predisposition report under Rule 803(8) even if that was not the basis specified at trial, as long as the elements of the rule were established.")

had no personal knowledge of the information in her report. The record reflects that in preparing her report, the caseworker relied on CPS referral records and assessments of the children, as well as other secondary sources. During cross examination, the caseworker admitted that she did not know the names of the CPS investigators upon whose reports she relied. She also did not know who made various substantiated and unsubstantiated referrals, or the specifics of many of the referrals of neglect or abuse." Id. at 199.

This Court upheld admission of the report under Rule 803(8), because it was prepared by the caseworker as part of her official duties. See also Yacht Club v. Utah Liquor Control Comm'n, 681 P.2d 1224, 1225-27 (Utah 1984) (to fall within scope of Rule 803(8)'s predecessor, report need only have been prepared by a public official, and making the report must be within scope of official's duties). In this case, there is no question that Officer Bigler was acting in his capacity as a public official, and that his duties included interviewing witnesses and preparing accident reports.[4]

As a second basis for admissibility, counsel for Benzow cited the court to Rule 803(1), which permits admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." When Officer Bigler interviewed her, Erica Wolfe was still lying on the side of the road, and he interviewed Carolyn shortly thereafter at the hospital. (T. 247, 249).

[4] Schwartz appears to suggest that Rule 803(8) is inapplicable to Bigler's oral testimony. (Brief of Appellant at 14). Officer Bigler was testifying from a review of his report, however (T.241), and Rule 803(8) applies to reports or statements "in any form."

It was well within the district court's discretion to admit the evidence under this exception.

Finally, even if the district court had committed error in admitting the testimony, there is no indication that such error substantially prejudiced Schwartz. There was ample evidence from which the jury could have reached the same conclusion, namely that both parties were equally at fault for Schwartz' accident. For example, the jury likely found significant that not a single witness – other than Schwartz herself – testified that the jeep struck the bicycle handlebars, even though Schwartz's own eyewitness said he saw the handlebars jerk around.

Moreover, as counsel for Benzow pointed out, while Schwartz might have believed that is what happened, she had suffered a painful impact to her head, and her recollection might not have been accurate. (T. 361-62). The jeep was covered in dust, yet the officer's thorough inspection could not uncover any scuff mark or other sign of an impact. Mr. and Mrs. Benzow both testified that they never got within two feet of Schwartz. This evidence, along with Schwartz' inexperience as a bicyclist in general, and on this stretch of road in particular, was more than sufficient for the jury to conclude that, while perhaps in hindsight Mr. Benzow should not have honked his horn at the riders, or perhaps he edged a little too close for the bicyclists' comfort, the accident was equally the result of Schwartz overreacting and losing control of her bicycle at a high speed.

Schwartz has not demonstrated an abuse of discretion by the trial court, or that any alleged error was sufficiently prejudicial as to warrant a new trial.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO ADD AN UNTIMELY INSTRUCTION TO THE JURY REGARDING PASSING ZONES.

During the course of proceedings, the district court entered a scheduling order. A trial date was set for November 18, 1998; jury instructions were to be submitted by October 20, 1998. (R. 43). The order stated: "Failure to submit . . . Request for Jury Instructions and Special Voir Dire questions within the time prescribed will result in the Court rejecting the late filing or non-filing of items, and the Court will deem them to have been waived . . . ." (Id.).

On the second day of trial, Schwartz requested for the first time three new jury instructions, including her proposed Instruction No. 22. (T.308-09). That proposed instruction restated Section 2 of Utah Code Ann. § 41-6-59:

> Where signs or markings are in place to define a no-passing zone under Subsection (1), an operator may not drive on the left side of the roadway within the no-passing zone or on the left side of any pavement striping designated to mark the no-passing zone throughout its lengths.

The purpose of the proposed instruction was to inform the jury that crossing a double yellow line is unlawful. (Brief of Appellant at 16).[5] Schwartz states that the trial court declined to give the instruction, but omits to mention the court's reasoning. Benzow's objection to the proposed instruction was on several grounds, including untimeliness, duplication, and prejudice:

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[5] Schwartz states in her brief that "her theory was that defendant crossed the yellow lines and struck Schwartz." (Brief of Appellant at 16). Technically, that statement of her theory is accurate. However, it should be reiterated for clarity that crossing of the double line occurred while Benzow and Schwartz were headed the same direction. Schwartz was not in the oncoming lane, which might be suggested by Schwartz's wording.

> Well, your Honor, it was my understanding we were supposed to have instructions in at pretrial. I think if you're going to have statutory duties imposed, then you also have to add additional instructions that the violation of statute is evidence of negligence, but it's not negligence, per se.
>
> You have to include the MUJI instruction that says something to the effect that in order to find a violation the statute is negligent, you have to find about eight different things that was inactive to protect the individuals involved. If you start putting in statutes as setting the duty, then there are other MUJI instructions that ought to be given.
>
> * * *
>
> Instruction No. 19 is setting forth the duties, common law duties. I don't think the plaintiff is being prejudiced because 19 goes through 8 subparts telling them what the duties of a driver are.

After additional dialogue, the Court concluded: "Since we did have the cutoff earlier, I'm just going to go with 19 the way it is." (T.313). This decision was well within the trial court's discretion, particularly as the duties of motor vehicle operators were extensively addressed in other instructions:

> [No. 18]: The driver of any vehicle has the duty to exercise reasonable care at all times to avoid placing others in danger and to avoid causing an accident.
>
> No. 19: The driver of any vehicle has the duty to use reasonable care to avoid danger. In that regard every driver is required, one, to keep a lookout for other vehicles and highway conditions that reasonably may be anticipated; two, to keep the vehicle under proper control; three, to drive at a safe speed, having proper regard for the width, surface and conditions of the highway, other traffic, visibility and any existing or potential hazards; four, to follow another vehicle at a safe distance with proper regard for both vehicles' speed, other traffic and highway conditions; five, to stop or suddenly slow down only after observing that it can be done safely and if an opportunity exists after signaling; six, to drive in one lane whenever possible and to change lanes only after observing that it can be done safely and after giving the appropriate signal; seven, to drive on the correct side of the highway; eight, to pass others only after observing that it can be done safely.

> No. 20. Even if a driver complies with an applicable statute, ordinance or safety rule, this does not excuse that driver from the duty to act with reasonable care in other respects. One must always maintain a proper lookout for other traffic and hazards reasonably anticipated on the highway, and keep one's car under proper control.
>
> No. 21: The law provides that any person driving a motor vehicle on a public highway shall keep a proper lookout. A proper lookout means maintaining the lookout that an ordinary careful person will use in light of all conditions existing at the time, and those reasonably to be anticipated. A proper lookout includes a duty to see objects and conditions in plain sight, to seek that which is open and apparent and to realize obvious dangers. This duty does not merely require looking, but also requires observing and understanding other traffic and general situations.

(T.325-26).

Additionally, it can hardly be said that the verdict would have been different if the instruction had been given. The jury already knew that Mr. Benzow had crossed a double yellow line while passing, and that doing so was a violation of the law. Officer Bigler had so testified, and Mr. Benzow had admitted it. Schwartz's counsel emphasized it in winding up his closing argument: "Mr. Benzow passed on a double line. The evidence, I think, is very clear as to his negligence and the fact that his negligence caused her injuries." (T. 371). See also T. 350. The jury instruction would have added nothing new.

Failing to give the untimely jury instruction, which would have required additional clarifying instructions, and which did not add anything to the duties already explained to the jury, was not an abuse of discretion, and does not support Schwartz's request for a new trial.

CONCLUSION

For the foregoing reasons, appellee respectfully requests this Court to affirm the district court's judgment.

DATED this 14th day of October, 1999.

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CERTIFICATE OF SERVICE

This is to certify that on the 14th day of October, 1999, two true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, first-class postage prepaid, to:

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